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ABSTRACT

A national sample of journalists, consisting of 700 television news photographers, newspaper photographers, television news directors, newspaper editors, and journalism educators, was asked to evaluate the ethical conduct in eight situations involving alleged invasion of privacy by photography. The respondents found journalistic conduct to be unethical in four of the eight situations but exhibited considerable uncertainty about ethical conduct in the other four situations. For seven of the eight situations, television photographers showed more timidity than newspaper photographers about approving journalistic conduct that might constitute an invasion of privacy. Television news directors showed substantial disagreement with television photographers concerning ethical conduct, as did newspaper editors with newspaper photographers. (Author/RL)

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THE PRYING EYE: ETHICS OF PHOTOJOURNALISM

A paper presented to the Photojournalism Division

Association for Education in Journalism Convention

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THE PRYING EYE: ETHICS OF PHOTOJOURNALISM

Concern for the right of privacy is rapidly growing, perhaps in direct ratio to increasing invasion of privacy by government and private agencies, including mass media. This growing concern is evident in litigation initiated by those who seek judicial remedy for alleged infringement of their right of privacy,[1] and in the literature which analyzes that asserted right.[2] The outlines of the legal right of privacy are therefore becoming more clearly defined as concern grows.

But the problem is ethical as well as legal, and the ethical aspects of the problem are not so well defined as the legal aspects. It is the purpose of this paper to seek the ethical parameters of a limited area within that asserted right: photojournalistic invasion of privacy.

To do this one must establish a norm against which alleged invasions of privacy by photography may be measured. This norm cannot be derived from case law, for case law is based upon statutes and judicial opinions—and that involves the judgment of legislators and of judges. But the ethics of a profession must be derived from the judgment of its practitioneers—in this case, from journalists themselves.

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[1]See, for example, decisions recorded in the MEDIA LAW REPORTER.

[2]See, for example, R. Cavallo and S. Kahan, PHOTOGRAPHY: WHAT'S THE LAW? (1976); G. Chernoff and H. Sarbin, PHOTOGRAPHY AND THE LAW (1975); A. Miller, THE ASSAULT ON PRIVACY (1971); A. Westin, PRIVACY AND FREEDOM (1970); and various reports of the Privacy Protection Study Commission, created by the Privacy Act of 1974.

To establish this norm, or consensus, the authors devised a survey questionnaire which contained brief descriptions of eight situations involving alleged invasion of privacy by photography. The eight were chosen to represent the four torts, or injuries, which together compose privacy law. Each of the four torts was represented by two cases: one involving alleged photographic invasion of privacy by television, and one by newspapers or magazines. Thus there are two cases which illustrate alleged invasion of privacy by unreasonable intrusion upon another's seclusion, two cases which illustrate alleged unreasonable public disclosure of private facts, two cases which illustrate alleged unreasonable publicity which places another in a false light, and two cases which illustrate alleged appropriation of another's name or image; and one case in each pair involves broadcasters, the other involves print journalists.

The questionnaires were sent to a national sample of 700 randomly selected journalists in five categories: television news photographers, newspaper photographers, television news directors, newspaper editors, and journalism educators. Each respondent was asked whether, in his opinion, the action described in each situation was ethical according to standards of journalism.

This paper concentrates on the responses of the photographers, who, after all, are the journalists most directly concerned. For purposes of comparison the responses to each question are recorded in percentages under three headings: television photographers, newspaper photographers, and all respondents. These percentages are indicated in a table directly below a description of each situation, given exactly as printed in the original

survey instrument. For information purposes, the facts of the actual case on which the situation is based appear below the responses.

Finally, because some respondents indicated that the photographer's job is simply to carry out the assignment, not to make ethical decisions, the responses of the television photographers are compared in a table with those of the television news directors, and the responses of the newspaper photographers are compared in a table with those of the newspaper editors. These tables will measure the extent of disagreement between photographers and their editors or news directors.

Situation A

"Following up on a story that a bar illegally serves minors, a TV newsfilm team enters the bar with lights on and cameras rolling while customers scatter or hide. The proprietor orders the team to leave, but for several minutes before leaving the cameraman continues to film. According to standards of journalism, has the newsfilm team acted ethically?"

Television Photographers		Newspaper Photographers		All Respondents	
YES	NO	YES	NO	YES	NO
20.0	80.0	30.3	69.7	30.4	69.6

Television Channel 2 in New York, owned and operated by CBS, had sent a camera crew to visit a number of restaurants which had been cited for health code violations. The crew and a reporter entered Le Mistral restaurant about 2 p.m. July 6, 1972, with bright lights on and with cameras rolling. This manner of newsgathering was standard operating procedure: the intent was to enter unannounced and to catch the occupants by surprise. Some patrons ducked under tables, others left without paying. The cameras continued to roll as the restaurant manager pushed the crew off the premises. At trial, CBS argued

that the First Amendment granted immunity from damages. But the jury found that the defendant's conduct constituted a trespass, and the appellate court upheld that verdict while quoting from Dietemann v. Time, Inc: "The First Amendment is not a license to trespass . . ." Le Mistral v. CBS, 402 N.Y.S. 2d 815 (1978).

The empathy, if any, of newspaper photographers for their colleagues in the electronic media is not readily apparent in their responses to Situation A. Or perhaps one may infer that television photographers, finding themselves in the front line here, are inclined to take a cautious approach. In any event, the television photographers are much less willing to approve the conduct of the hypothetical newsfilm team than are the print photographers, whose responses coincide almost exactly with the figure for all respondents.

Situation B

"A newspaper photographer accompanies police with their permission into a burned-out private home and takes a picture of a woman's body. The woman's husband learns of her death when he sees the picture in the newspaper. According to standards of journalism, has the photographer acted ethically?"

Television Photographers		Newspaper Photographers		All Respondents	
YES	NO	YES	NO	YES	NO
53.7	46.3	59.4	40.6	57.0	43.0

The Florida Times-Union published on September 16, 1972, a photograph of a silhouette left on the floor after removal of a body from a burned-out home. The body was that of Cindy Fletcher, 17-year-old daughter of the plaintiff, who was away from home at the time of the fire. She learned of her daughter's death by viewing the published photograph. At trial, Florida

Publishing Co. argued that consent to enter private property was implied by common custom, usage, and practice under these circumstances. The judge agreed and granted summary judgment for the newspaper, and the appellate court upheld that decision. Florida Publishing v. Fletcher, 319 So. 2d 100 (1976).

Both sets of photographers approached the norm, or consensus (represented by the figure for all respondents), in Situation B. But the response of the newspaper photographers was closer to the norm than that of the television photographers, who were still inclined to adopt a more cautious attitude, as in Situation A.

Situation C

"A TV cameraman films a man's arrest on charges of threatening citizens with a shotgun. Following a police order to surrender, the man emerges from his home completely nude. The film is aired that evening, revealing genitals. According to standards of journalism, has the cameraman acted ethically?"

Television Photographers		Newspaper Photographers		All Respondents	
YES	NO	YES	NO	YES	NO
65.0	35.0	75.8	24.2	51.2	48.8

Television station KTVB in Boise, Idaho, during a regular news broadcast on March 11, 1972, aired a film segment showing the arrest of Oren Taylor at his home. Taylor was taken from his home in the nude, and during the telecast his buttocks and genitals were briefly visible. At trial, KTVB argued that there is an absolute privilege to report truthfully all details of an event of current public interest without incurring liability for invasion of privacy. The jury disagreed and awarded Taylor $15,000, but the appellate court overturned this judgment. However, the appellate court ruled that the

privilege to report is not an absolute privilege, as maintained by KTVB; rather, the privilege could be overcome by a showing of malice, and the case was remanded to the lower court to determine whether there was malice. Taylor v. K.T.V.B., Inc. 525 P. 2d 984 (1976).

Once again, as in Situations A and B, the television photographers were more cautious than their counterparts in print journalism. But both groups were decisive in holding that the cameraman had acted ethically. Note the disparity of opinion between the photographers and the consensus, as expressed in the figure for all respondents. Clearly there is strong disagreement as to what constitutes ethical conduct in this example. Interestingly, there was also strong disagreement in the offices of KTVB, according to court records: the cameraman stopped filming when he realized that Taylor was nude; but the film editor chose not to snip out the brief display of nudity. The film editor was fired as a result. As the chief justice of the Idaho Supreme Court so aptly wrote in his opinion, "Thus ended, probably for all time, the onset of X-rated television newscasts in the Boise Valley." 525 P. 2d 984 at 989.

Situation D

"A magazine photographer takes a picture of a sports fan during a football game. The fan knows the photographer's occupation and that he is taking the fan's picture. The fan's fly is open, and the picture is used to illustrate an article entitled, 'A Strange Kind of Love.' According to standards of journalism, has the cameraman acted ethically?"

Television Photographers		Newspaper Photographers		All Respondents	
YES	NO	YES	NO	YES	NO
24.4	75.6	24.2	75.8	22.5	77.5

Sports Illustrated magazine, in its issue of August 5, 1974, published a photograph of John Neff as he danced about on a dugout from which the Pittsburgh Steelers were soon to emerge. Neff's picture was taken with his fly open as the photographer waited for the Steelers to appear. The publisher argued that the picture was taken with Neff's full knowledge and consent; Neff argued the reverse. The court found that the photograph had been taken with Neff's active encouragement and participation, and the court granted the publisher's motion for summary judgment. Neff v. Time, 406 F. Supp. 858 (1975).

Substantial agreement here, among all three groups. Because ethical conduct is so much a matter of values and judgment, substantial agreement must be the exception, rather than the rule. In this instance all parties seem to concur in their evaluation of journalistic conduct as unethical; the real disparity lies between peer disapproval and the judicial determination that there is no legal liability for those acts—that is, between ethics and law.

Situation E

"A TV cameraman films a police gambling raid at a hotel. An innocent bystander is mistakenly interrogated by police as the camera records the scene, later aired unedited. The bystander is not identified by name in the voiceover. According to standards of journalism, has the cameraman acted ethically?"

Television Photographers		Newspaper Photographers		All Respondents	
YES	NO	YES	NO	YES	NO
52.5	47.5	57.6	42.4	48.8	51.2

A Miami television station, on January 3, 1954, showed a film depicting a gambling raid at the cigar shop of the Casablanca Hotel. John Jacova, an

innocent bystander, was pictured as he was questioned by officers. Jacova was not named in the voiceover, but contended he was "depicted as being arrested as a gambler." The defendant television station argued that it was immune from suit for publishing his photograph in connection with a legitimate news item. The trial judge agreed, granting summary judgment to Southern Radio and Television Company, and the appellate court affirmed. Jacova v. Southern Radio and Television Company, 83 So. 2d 34 (1955).

Television photographers again emerge as more timid than their colleagues in print photography—more timid in that they are less willing to approve the conduct of the TV cameraman in Situation E. Nevertheless, a majority of the photographers in each group considers the actions of the TV cameraman to be ethical, whereas the figures for all respondents reveal that the reverse is true. That is, the consensus—represented by the figures for all respondents —is in the negative; but the photographers themselves respond in the affirmative. A certain amount of defensiveness may be showing.

Situation F

"A magazine publisher illustrates an article on the bad risks of love at first sight ('100% sex attraction') with a picture of a man and wife seated at a public lunch counter, cheek to cheek. The picture was taken without the knowledge of the couple and used without their consent. According to standards of journalism, has the publisher acted ethically?

Television Photographers		Newspaper Photographers		All Respondents	
YES	NO	YES	NO	YES	NO
7.5	92.5	15.2	84.8	13.0	87.0

A picture of John and Sheila Gill appeared in the May 1949 issue of Ladies

Home Journal. Taken without their consent, it showed them as they sat cheek to cheek on the customers' side of the counter at their ice cream stand in Los Angeles. A caption identified their relationship as an example of love at first sight, termed "a bad risk." The article referred to love at first sight as founded upon 100% sex attraction. The Gills complained they were depicted as dissolute and immoral persons, whereas they were happily married and of high moral reputation. Curtis Publishing Co. contended that the photograph served the public interest and did not seriously interfere with plaintiffs' privacy. The California Supreme Court held that the photograph was not newsworthy, that the public interest did not require publication without consent, and that the photograph falsely depicted plaintiffs and disregarded their rights. Gill v. Curtis Publishing Co. 239 P. 2d 630 (1952).

All respondents, including both groups of photographers, overwhelmingly find the conduct of the publisher to be reprehensible when measured against the standards of responsible journalism. The key words in Situation F may be "without their consent." Consent by the subjects of the photograph would undoubtedly transform the publisher's decision into ethical conduct, but it does not necessarily follow that lack of consent renders the publisher's decision unethical. Nevertheless, the consensus is unmistakable. It is interesting to note that once again the television photographers emerge as more timid than their brothers in print journalism.

Situation G

"A TV news cameraman films the entire act of a circus performer over his protests as the performer dives 12 stories into a tank of water six feet deep. The performance is broadcast on the evening news. According to

standards of journalism, has the news cameraman acted ethically?"

Television Photographers		Newspaper Photographers		All Respondents	
YES	NO	YES	NO	YES	NO
32.5	67.5	56.3	43.7	50.2	49.8

Hugo Zacchini, a "human cannonball," was performing at a fair in Burton, Ohio, on the night of August 31, 1972. Zacchini saw a cameraman for Scripps-Howard Broadcasting Company and asked him not to film the performance. The cameraman did so anyway, and the 15-second film clip was shown on the 11 p.m. newscast. Zacchini charged that the defendant had unlawfully appropriated and commercialized the performer's professional property. Scripps-Howard contended that First Amendment principles require that the right of privacy give way to the public right to be informed of matters of public interest. The U.S. Supreme Court ruled that while entertainment as well as news enjoys First Amendment protection, the Constitution is not a privilege to the press in these circumstances, Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977).

A serious divergeance exists between television photographers and newspaper photographers in their responses to Situation G. Well over half of the newspaper photographers found the cameraman's action to be ethical, while less than a third of the television photographers agreed. As in nearly every other situation, the television photographers exhibited reluctance to approve the conduct described in Situation G to the same extent as their counterparts in print.

Situation H

"A magazine publisher uses a drawing of a nude boxer, unidentified by name but recognizable as a former boxing champion, without his consent. The

drawing is accompanied by a plainly fictional bit of doggerel. According to standards of journalism, has the publisher acted ethically?"

Television Photographers		Newspaper Photographers		All Respondents	
YES	NO	YES	NO	YES	NO
17.5	82.5	24.2	75.8	16.2	83.8

Muhammad Ali sought an injunction against Playgirl magazine to withdraw the February 1978 issue from circulation, recover copies then for sale, and surrender printing plates used to reproduce in that issue a portrait recognizably that of Ali. The drawing depicted a boxer in full frontal nudity as he sat on a stool in a ring. The court ruled that injunctive relief was warranted because the magazine appeared to be usurping Ali's right to publicity as well as inflicting damage upon his marketable reputation. Ali v. Playgirl, Inc., 447 F. Supp. 723 (1978).

As in every other situation except Situation D, the television photographers are less willing to approve the conduct of the publisher in this situation than the newspaper photographers are. Or, conversely, television photographers are more willing to condemn. It is true, of course, that condemnation by all respondents, including both groups of photographers, is overwhelming.

Comparing the responses of television photographers and newspaper photographers is a useful exercise. It permits one to estimate, among other things, the effect of technology on standards of responsible journalism. For example, the results of this survey reveal that television photographers, in seven of the eight responses, were less willing than their print colleagues to approve the conduct described in the hypothetical situations. In the eighth response the margin was so close (two-tenths of a

percentage point) that it was a distinction without a difference. One might reasonably speculate that electronic journalism, requiring bulkier equipment, brighter lights, and additional personnel in many instances, is more intrusive than the presence of a newspaper photographer with his 35mm camera, and that television photographers, feeling encumbered by their gear, are consequently more hesitant to assert their "rights." Such hesitance would naturally be reflected in a reluctance to approve assertive conduct.

On the other hand, one could with equal justification find that the relative willingness of newspaper photographers to approve the conduct of their colleagues arises out of an historical freedom built on the First Amendment—a freedom which broadcasters do not enjoy to the same degree.

But whichever explanation be the reality, this much is certain: television photographers are consistently more conservative than their counterparts in print with respect to standards of responsible journalism as applied to invasion of privacy by photography.

For some respondents to this survey, the real issue is not how television photographers compare with newspaper photographers, but rather how photographers in each medium compare with their supervisors—the news directors and news editors. As one respondent phrased it, " . . . [A] photographer-cameraman's job is to film anything he can . . . . How the work is used, or if it's used at all, is the responsibility of his editors." This point of view overlooks the fact that only two of the four torts, or injuries, which together compose privacy law, require publicity as an essential element of proof. Intrusion (for example, trespass) and appropriation (for example, impersonation) are completed when the act has taken place, not when the fruits of the act are

subsequently publicized.

Nevertheless, it may be instructive to display the responses of photographers and their news directors / news editors in tabular form.

ACCORDING TO STANDARDS OF JOURNALISM, HAS THE JOURNALIST ACTED ETHICALLY?

Situation	TV News Directors		TV Photographers	
	YES	NO	YES	NO
A	33.8	66.2	20.0	80.0
B	52.2	47.8	53.7	46.3
C	38.8	61.2	65.0	35.0
D	20.6	79.4	24.4	75.6
E	45.6	54.4	52.5	47.5
F	14.5	85.5	7.5	92.5
G	47.1	52.9	32.5	67.5
H	14.5	85.5	17.5	82.5

The table reveals some wide fluctuations of opinion, particularly in Situation C, where there is complete reversal, but also in Situations A, F, and G, and to some extent in Situation E. The variations do not arrange themselves into a pattern, but one can easily imagine hearing loud voices in the newsroom raised in disagreement over the propriety of picture-taking.

When the responses of newspaper photographers are compared with those of newspaper editors, a pattern is somewhat more readily discernible.

ACCORDING TO STANDARDS OF JOURNALISM, HAS THE JOURNALIST ACTED ETHICALLY?

Situation	Newspaper Editors		Newspaper Photographers	
	YES	NO	YES	NO
A	37.3	62.7	30.3	69.7
B	57.8	42.2	59.4	40.6
C	41.6	58.4	75.8	24.2
D	25.5	74.5	24.2	75.8
E	47.1	52.9	57.6	42.4
F	12.6	87.4	15.2	84.8
G	60.4	39.6	56.3	43.7
H	12.7	87.3	24.2	75.8

Wide fluctuations of opinion occur in Situations C and H, and substantial disagreement exists between editors and photographers in Situations A

and E. The "pattern" may be discerned in the strength or conviction in the responses of the newspaper photographers, when compared with responses of the editors. The strength of opinion can be calculated by computing a mean for the columns of figures. The mean for the yes-response column under Newspaper Editors is 36.9; the mean for the corresponding column under Newspaper Photographers is 42.9. The significance of the figures is this: newspaper photographers are much more willing to consider journalistic conduct in the eight situations to be ethical than their editors are. And comparing the mean figure for the newspaper photographers with that of the television news directors (33.4) and with that of the television photographers (34.1) tends to support this conclusion. The mean figure for the yes responses of all those surveyed is 36.2, and it is therefore clear that newspaper photographers as a group depart from the norm, whereas the other three groups tend to reinforce the norm.

SUMMARY OF FINDINGS

Several findings may be gleaned from the survey results:

1. A decisive majority of all respondents found journalistic conduct to be unethical in four of the eight situations: A (69.6%), D (77.5%), F (87.0%), and H (83.8%). But in the other four situations the respondents demonstrated considerable uncertainty about the ethical/unethical quality of the journalistic conduct: B (57.0%/43.0%), C (51.2%/48.8%), E (48.8%/51.2%), and G (50.2%/49.8%).

2. By extracting the responses of television photographers and newspaper photographers and comparing them, the authors of this paper discovered

that in seven of the eight situations (excepting only Situation D), television photographers were more timid about approving journalistic conduct which might constitute an invasion of privacy. Alternately, the same comparison reveals that in the same situations newspaper photographers were more aggressive about approving journalistic conduct which might constitute an invasion of privacy.

3. By computing a mean for all responses of each group of photographers and a mean for all responses of the entire sample, then comparing the means, the authors concluded that newspaper photographers are likely to be more aggressive than television photographers in a situation involving alleged invasion of privacy by photography.

4. Comparing responses of television news directors and television photographers reveals substantial disagreement in four (A, C, F, G) of the eight situations, including diametrically opposed attitudes in Situation C. Disagreement also exists to some extent in Situation E.

5. Comparing responses of newspaper editors and newspaper photographers reveals substantial disagreement in three (C, E, H) of the eight situations, including diametrically opposed attitudes in Situation C. Disagreement also exists to some extent in Situation A.

CONCLUSION

The survey findings reveal uncertainty among professional journalists as to exactly what constitutes unethical journalistic conduct. Disagreement among members of a single medium is common, suggesting difficult working relationships. Continuing education, perhaps by means of in-service workshops, would help relieve uncertainty and create harmony.